

Supreme Court Copy

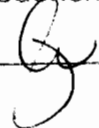
SUPREME COURT
FILED

MAR - 2 2010

Case No. S177075

Frederick K. Ohlrich Clerk

IN THE


Deputy

SUPREME COURT OF CALIFORNIA

CRC
8.25(b)

OCTAVIANO CORTEZ,

Plaintiff/Appellant,

v.

et al.,

~~MIGUEL QUEZEDA ORTIZ~~ LOURDES ABICH ~~and~~ ~~OMAR ABICH~~

Defendants/Respondents

After a Decision by the Court of Appeal,
Second Appellate District, Division Four
Case No. B210628

OPENING BRIEF ON THE MERITS

Arash Homampour, State Bar No. 165407
The Homampour Law Firm, PLC
8383 Wilshire Boulevard - Suite 830
Beverly Hills, California 90211
Phone: (323) 658-8077 | Fax: (323) 658-8477
Email: arash@Homampour.com

Stuart Sherman, State Bar No. 128373
30961 W. Agoura Road, Suite 215
Westlake Village, California 91361
Phone: (818) 706-3790 | Fax: (877) 706-3795
Email: stuartsher@sbcglobal.net

Attorneys for Petitioner/Appellant/Plaintiff OCTAVIANO CORTEZ

Case No. S177075

IN THE
SUPREME COURT OF CALIFORNIA

OCTAVIANO CORTEZ,

Plaintiff/Appellant,

v.

MIGUEL QUEZEDA ORTIZ, LOURDES ABICH and OMAR ABICH,

Defendants/Respondents

After a Decision by the Court of Appeal,
Second Appellate District, Division Four
Case No. B210628

OPENING BRIEF ON THE MERITS

Arash Homampour, State Bar No. 165407
The Homampour Law Firm, PLC
8383 Wilshire Boulevard - Suite 830
Beverly Hills, California 90211
Phone: (323) 658-8077 | Fax: (323) 658-8477
Email: arash@Homampour.com

Stuart Sherman, State Bar No. 128373
30961 W. Agoura Road, Suite 215
Westlake Village, California 91361
Phone: (818) 706-3790 | Fax: (877) 706-3795
Email: stuartsher@sbcglobal.net

Attorneys for Petitioner/Appellant/Plaintiff OCTAVIANO CORTEZ

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
SPECIFICATION OF ISSUES PRESENTED	1
INTRODUCTION	2
SUMMARY OF FACTS	
Acting as Unlicensed Contractors and Owner/Builder, the Abich Defendants Perform an Extensive Year Long Demolition and Construction Project Through Unlicensed Workers and Without Complying with Safety Regulations	3
PROCEDURAL HISTORY	5
ARGUMENT	9
I. DEFENDANT HOME OWNERS' EXTENSIVE REMODELING, CONSTRUCTION AND DEMOLITION PROJECT DOES NOT FIT WITHIN THE HOUSEHOLD DOMESTIC SERVICE EXCEPTION TO THE CALIFORNIA OCCUPATIONAL SAFETY AND HEALTH ACT (LABOR CODE SECTION 6300 ET SEQ.)	9
II. IF THIS COURT UPHOLDS THE COURT OF APPEAL'S HOLDING THAT HOMEOWNERS ARE NOW EXEMPT FROM OSHA WHEN THEIR REMODEL IS TO ENHANCE THE OWNERS' ENJOYMENT OF THEIR RESIDENCE, CODE OF CIVIL PROCEDURE SECTION 437C(M)(2) AND DUE PROCESS REQUIRES THAT THIS CASE BE REMANDED TO ALLOW PLAINTIFF TO ENGAGE IN FURTHER DISCOVERY ON THE NEW ISSUE AS IT WAS NOT A GROUND RELIED UPON BY THE TRIAL COURT . .	16
CONCLUSION	20

TABLE OF AUTHORITIES

Page

CASE LAW

<i>Adams v. Pacific Bell Directory</i> (2003) 111 Cal.App.4th 93	17
<i>Carmel Valley Fire Protection Dist. v. State of California</i> (1987) 190 Cal. App. 3d 521, 541	12
<i>Elsner v. Uveges</i> (2004) 34 Cal. 4th 915, 930	16
<i>Fernandez v. Lawson</i> (2003) 31 Cal.4th 31	7, 13, 14
<i>Fraenkel v. Bank of America</i> (1953) 40 Cal. 2d 845	11
<i>Hunt Building Corp. v. Bernick</i> (2000) 79 Cal.App. 4th 213	12
<i>Juge v. County of Sacramento</i> (1993) 12 Cal.App.4th 59	18
<i>People v. Villa</i> (2009) 45 Cal. 4th 1063, 1076	1
<i>Saelzler v. Advanced Group 400</i> (2001) 25 Cal.4th 763	18
<i>Scottsdale Ins. Co. v. MV Transportation</i> (2005) 36 Cal.4th 643, 654	2
<i>Seaboard Acceptance Corp. v. Shay</i> (1931) 214 Cal. 361, 365	15

STATE STATUES

Bus. & Prof. Code § 7000	11
Bus. & Prof. Code § 7026	11

TABLE OF AUTHORITIES (CONT.)

Page

STATUTES

Bus. & Prof. Code § 7028	11
Bus. & Prof. Code § 7065	11
Bus. & Prof. Code § 7067.5	12
Bus. & Prof. Code § 7068	11
Bus. & Prof. Code § 7069	12
Bus. & Prof. Code § 7071.6	12
Bus. & Prof. Code § 7125	12
Cal. Rules of Court 8.516	2
Code of Civil Procedure Section § 437c(m)(2)	1, 2, 8, 17, 20
Code of Civil Procedure Section § 1858	15
Code of Civil Procedure Section § 3521	9
Labor Code Section 2750.5	1, 6, 10
Labor Code Section 6300	1, 9, 14, 15
Labor Code Section 6303	2, 9, 10, 14, 15
Labor Code Section 6400	2, 9, 10, 14, 15
Labor Code Section 6401	9, 10, 14, 15

SPECIFICATION OF ISSUES PRESENTED

This Court granted Petitioner/plaintiff/appellant Octaviano Cortez's petition for review and stated that this "case includes the following issue:

Did the Court of Appeal err in holding that the defendant home owner's remodeling project, which added a new master bedroom, a new master bath, a new garage in place of a carport, and a new roof, fit within the household domestic service exception to the California Occupational Safety and Health Act (Labor Code section 6300 et seq.) ?

Cortez's petition also sought review of the following issue:

Where the Court of Appeal affirms summary judgment on the basis of a newly articulated exemption and a ground not raised by the moving party or the trial court, does C.C.P. § 437c(m)(2) require that opposing party be afforded an opportunity to engage in further discovery and briefing to establish whether or not the activity in this case satisfies the exemption?

The Abich Defendants have attempted to raise an additional issue on review by way of an unsolicited letter to this Court regarding Labor Code § 2750.5. The Court of Appeal found that Labor Code § "2750.5 makes the Abiches appellant's employer with respect to potential tort liability." (Opinion, p. 6). But, Defendants did not raise this issue in a petition for review or in the answer to Plaintiff's petition and this Court has not identified this as an issue on review. Accordingly, it is Plaintiff's position that this issue is not properly before this Court. (*People v. Villa* (2009) 45 Cal. 4th 1063, 1076; *Scottsdale*

Ins. Co. v. MV Transportation (2005) 36 Cal.4th 643, 654, fn. 2; see Cal. Rules of Court, rule 8.516.)

INTRODUCTION

The Court of Appeal did err in its holdings. The property owner defendants (Abiches) acted as unlicensed general contractors using unlicensed workers and engaged in a year long extensive remodel of a home by adding a new master bedroom and new master bath, replacing the car port with a new garage, demolishing and adding a new roof, and adding over 750 square feet. This “demolition” and “construction” activity is expressly recognized by statute as the type of “employment” which requires compliance with OSHA safety regulations. (Labor Code §§ 6303(b) and 6400(a).) This “demolition” and “construction” activity cannot reasonably be construed to be a “household domestic service” under which an employer does not have to comply with safety regulations. Defendant Omar Abich is not an unsuspecting homeowner. He elected to be the owner/builder on an extensive construction project and with that choice came the obligation to provide for the safety of workers on the project.

If this Court determines that the Court of Appeal did not err on the first issue and that a homeowner is now exempt from OSHA when the remodel is to enhance the owners’ enjoyment of their residence, the matter should be remanded under C.C.P. § 437c(m)(2) so that Cortez is afforded an opportunity to engage in further discovery and briefing to establish whether or not the activity in this case satisfies this newly articulated exemption.

SUMMARY OF FACTS

Acting as Unlicensed Contractors and Owner/Builder, the Abich Defendants Perform an Extensive Year Long Demolition and Construction Project Through Unlicensed Workers and Without Complying with Safety Regulations

Defendants Omar and, his mother, Lourdes Abich sought to remodel their property by demolishing an old roof and adding a new roof, adding a new master bedroom and master bath, replacing the car port with a new garage, and adding over 750 square feet. [AA94, 95, 96, 97, 132, 161, 162, 168, 174, 223, 287] Omar Abich was the “owner-builder” of the project where Plaintiff was injured [AA223, 287]

Omar Abich obtained permits from the City of Pasadena to remodel the home. [AA163, 223, 287] But, he was not a general contractor and did not have a contractors license. [AA 133, 160, 223, 287] Omar Abich did not know if any of the people he hired (including Miguel Quezada Ortiz) had a contractor’s license. [AA167, 170, 224, 288] Ortiz was not a licensed contractor. [AA188, 224, 288]

The Abich Defendants did not supervise the details of the job assigned to Plaintiff or Ortiz [AA 102, 249]

There was a dispute between the parties as to what Ortiz was hired to do. Defendant Omar Abich claims that he only hired Ortiz to tear a wooden

deck off in the back of the house. [AA100, 166] Plaintiff disputed this fact (pointing out there was no evidence to support this assertion other than Defendant Omar Abich's testimony) and stating he (Plaintiff) never went to the backyard to remove a patio deck, he never saw Ortiz remove any portion of a patio deck and that Ortiz was actually up on the roof removing portions of the roof. [AA152, 153, 212, 213, 234]

Plaintiff Cortez was told by Ortiz to gather up debris and continue knocking down the roof. [AA 225, 289] This was his first day on the job and he was to be paid \$80. [AA99, 230] When Plaintiff arrived at the house, half of the roof was missing as part of the project. [AA35, 99, 151, 153, 230] After about an hour of collection debris from the demolition, Plaintiff went up to the roof because "that's what we were there for" and "there was nothing else to do down there". [AA 99, 152, 153, 154, 230] Even though Plaintiff understood he was there to continue knocking down the roof [AA150, 225, 289], he was not given "specific instructions" to go up on the roof but went up because he thought it was convenient and he thought he was doing the right thing. [AA37, 38, 99, 152, 153, 154, 232]

Plaintiff took a step onto the roof with his left foot and it felt sturdy. He then took a step with his right foot and then it collapsed and went through the roof. [AA155, 156, 225, 289] Plaintiff fractured his spine as a result of the accident. [AA157, 226, 292]

Defendant Omar Abich never inspected the roof prior to placing on the new roof or letting workers go on the roof. [AA171, 226, 291] Defendant Omar Abich did not provide a code of safe practices for the project and did not provide fall protection. [AA173, 226, 291]

The work began on the project in October 2006 and continued through September 2007. [AA192 - 197, 223, 288]

PROCEDURAL HISTORY

Plaintiff Cortez brought this personal injury action on January 25, 2007 seeking damages for injuries suffered when he fell through the roof at the premises. He brought two causes of action; general negligence and premises liability. He alleged that Defendants “were negligent in failing to properly supervise, warn, provide proper safeguards, provide proper tools, provide proper training, and/or make the area safe where the plaintiff was directed to perform certain work.” [AA1 - 5] He also alleged that Defendants “negligently owned, maintained, managed and operated the described premises.” [AA5] On March 26, 2007, Plaintiff amended his complaint and named Defendant Lourdes Abich as Doe 1 and Defendant Omar Abich as Doe 2. [AA6 - 7]

The Abich Defendants filed an Answer on April 29, 2007. [AA10 - 11]

On April 29, 2008, Defendants Lourdes and Omar Abich filed a Motion for Summary Judgment *arguing* that they owed no duty to Plaintiff. [AA17 - 97, 23] Plaintiff filed an Opposition [AA98 -255] and Defendants filed a Reply. [AA256 -294]

The trial court, in a minute order (issued after the hearing), granted summary judgment finding, in pertinent part to this Petition, that: 1) Plaintiff was not an employee of the Abich defendants pursuant to Labor Code § 2750.5 and 2) that the Abich defendants were not required to comply with OSHA [AA295 - 297] The trial court sustained Plaintiff's evidentiary objections [AA254-255] to Defendants' evidence. [AA296]

Judgment in favor of the Abich Defendants was entered on August 4, 2008 [AA298] and notice of entry of judgment was served on August 6, 2008 [AA309] Timely notice of appeal from the judgment was filed on September 2, 2008. [AA318]

In affirming summary judgment for Defendants, the Second District Court of Appeal issued a published opinion concluding that Labor Code § "2750.5 makes the Abiches appellant's employer with respect to potential tort liability." (Opinion, p. 6) But, it then concluded that "the Abiches were not required to comply with OSHA as a matter of law." (Opinion, p. 10.) It further noted that "[w]hile we do not suggest that every project undertaken by a homeowner is exempt from the application of the OSHA the regulations, we conclude the remodel at issue is exempt because its purpose was personal – to

enhance the owners' enjoyment of their residence." (Opinion, p. 10) In a concurring opinion, Justice Epstein stated:

I concur in the opinion but write separately to express my misgivings about the conclusion that homeowners are exempt from OSHA regulations when remodeling their residence where their purpose is personal, "to enhance the owners' enjoyment of their residence." It is one thing to conclude that the "household domestic service" exception in OSHA makes that statute inapplicable to tree trimming, as our Supreme Court held in *Fernandez v. Lawson* (2003) 31 Cal.4th 31, or even to the removal and replacement of a roof. It is another to say that the phrase is so broad as to encompass a home remodeling involving demolition of a roof, the addition of a new one, together with remodeling the master bedroom, bath and garage, adding over 750 square feet to the home. The exemption applies even to a project of such scale, we say, because the owners are having it done to enhance [their] enjoyment of their residence. rather than for a commercial purpose. We decline to suggest that every project undertaken by a homeowner is exempt, but it is difficult to see where a reasonable line would be drawn if the work in this case satisfies the exemption. (Concurring Opinion., p.13.)

Plaintiff Cortez filed a petition for rehearing and a request for judicial notice, both of which were denied. Cortez argued that the Court of Appeal articulated a new exemption from OSHA regulations for home construction remodels that neither Defendants nor the trial court raised as a basis for summary judgment. Citing C.C.P. § 437c(m)(2), Cortez requested that he be

given an opportunity to engage in further discovery and briefing to establish whether or not “the work in this case satisfies the exemption.”

Cortez argued that he would be able to show that the subject remodel was not personal in nature. He filed a separate motion asking the Court of Appeal to take judicial notice of the April 2008 Grant Deed (Exhibit A to Request for Judicial Notice) showing that Defendant Abich sold the subject home shortly after the subject project (which went through September 2007) [AA 192 - AA197, AA 223.] Cortez asserted that the fact that Defendants sold the home shortly after the extensive remodel shows that the remodel was not “personal - to enhance the owners’ enjoyment of their residence.” If allowed to conduct further discovery per C.C.P. § 437c(m)(2), the evidence was expected to show that the work in this case does not satisfy the Court of Appeal’s articulated exemption and, accordingly, Defendants would be subject to OSHA regulations. Cortez explained that this document was not obtained earlier or included below (or presented to the trial court) because the Court of Appeal’s distinction between a remodel done for personal enjoyment (exempted) versus a remodel to sell or “flip” the home (not exempted) was not raised by Defendant or the Trial Court as a basis for determining whether the construction activity is exempted from OSHA regulations as a “household domestic service.”

ARGUMENT

I. **DEFENDANT HOME OWNERS' EXTENSIVE REMODELING, CONSTRUCTION AND DEMOLITION PROJECT DOES NOT FIT WITHIN THE HOUSEHOLD DOMESTIC SERVICE EXCEPTION TO THE CALIFORNIA OCCUPATIONAL SAFETY AND HEALTH ACT (LABOR CODE SECTION 6300 ET SEQ.)**

Defendant property owners tried to cut corners and acted as their own unlicensed general contractors on the construction project [AA223,287], while ignoring their obligation to provide a safe place of employment. It has been one of our Maxims of Jurisprudence for over 200 years that “[h]e who takes the benefit must bear the burden.” (Civil Code § 3521.)

Labor Code §§ 6303(b), 6400(a) and 6401 are clear. § 6400(a) requires that:

[e]very employer shall furnish employment and a place of employment that is safe and healthful for the employees therein. (italics added.)

§ 6401 requires that:

[e]very employer shall furnish and use safety devices and safeguards, and shall adopt and use practices, means, methods, operations, and processes which are reasonably adequate to render such employment and place of employment safe and healthful. Every employer shall do every other thing reasonably necessary to protect the life, safety, and health of employees. (Italics added.)

§ 6303(b) defines “Employment” as including:

the carrying on of any trade, enterprise, project, industry, business, occupation, or work, including all excavation, **demolition**, and **construction work**, or any process or operation in any way related thereto, in which any person is engaged or permitted to work for hire, *except household domestic service*. (italics and bold added.)

As statutory employers under Labor Code § 2750.5, the Abich Defendants owed a duty to Plaintiff to comply with OSHA safety regulations and provide a safe place of employment because they were engaging in “**demolition**” and “**construction work**.”

Plaintiff asks this Court to simply apply the Labor Code as written. As written, Labor Code §§ 6303(b), 6400(a) and 6401 impose an obligation on *every* employer that engages in “demolition” and “construction work” to provide a safe place of employment, to furnish and use safety devices, and to do every other thing reasonably necessary to protect the safety of employees. Here, the Abich Defendants made a choice to act as owner/builder and unlicensed general contractors on an extensive construction project using unlicensed workers. With the benefit of using unlicensed workers to perform “demolition” and “construction work” when such work requires a license is the burden of complying with safety regulations.

The Contractors' State License Law (Bus. & Prof. Code § 7000, et seq.) provides a comprehensive scheme governing contractors doing business in

California. A contractor is defined as follows:

The term contractor . . . is synonymous with the term 'builder' and . . . is *any person*, who undertakes to . . . construct, alter, repair, add to . . . any building, highway, road, parking facility, railroad, excavation or other structure, project, development or improvement, or to do any part thereof, including the erection of scaffolding or other structures or works in connection therewith The term contractor includes subcontractor and specialty contractor." (Bus. & Prof. Code § 7026 (italics added).)

Further, contractors that demolish or remove structures must have a specialty license or Class C-21 designation. 16 C.C.R. 832.21. It is illegal (a misdemeanor) for "any person to engage . . . in the capacity of a contractor within this state without having a license..." (Bus. & Prof. Code § 7028(a).)

California Courts have long emphasized that the Contractors' State License Law "was enacted for the safety and protection of the public against imposition by persons inexperienced in contracting work. . ." (*Fraenkel v. Bank of America* (1953) 40 Cal. 2d 845, 848.) To obtain a contractor's license, an applicant must:

- take and pass an examination (Bus. & Prof. Code § 7065);
- possess general knowledge of California's building, safety,

health and lien laws (Bus. & Prof. Code § 7068);

- have good character (Bus. & Prof. Code § 7069);
- show financial solvency (Bus. & Prof. Code § 7067.5);
- maintain workers compensation insurance (Bus. & Prof. Code

§ 7125); and

- post a contractor's bond (Bus. & Prof. Code § 7071.6)

(*Hunt Building Corp. v. Bernick* (2000) 79 Cal.App.4th 213, 218.)

By not having the required contractor's license, the property owner Defendants in this case did not pass any examinations and did not establish that they have general knowledge of California's safety laws. The end result of the Court of Appeal's opinion is dangerous. Property owners can violate the law, take unsafe risks, expose workers to grave harm and avoid any real accountability by characterizing the extensive construction work as personal in nature. This Court should confirm that this type of "demolition" and "construction work" is not exempt from safety regulations as a household domestic service.

The term "household domestic service" is not defined. However, California OSHA was modeled after Federal Laws (*Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal. App. 3d 521, 541) and guidance as to what is and what is not a "domestic household service" can be found by looking to Federal OSHA at 29 CFR 1975.6 - "Policy as to domestic household activities in private residences", which expressly provides that:

As a matter of policy, individuals who, in their own residences, privately employ persons for the purpose of performing for the benefit of such individuals what are commonly regarded as ordinary domestic household tasks, such as house cleaning, cooking, and caring for children, shall

not be subject to the requirements of the Act with respect to such employment.

In other words, Federal OSHA defines domestic service as “house cleaning, cooking and caring for children.” Excluding domestic household activities from OSHA makes sense. Activities such as house cleaning, cooking and caring for children can be performed by the average homeowner, who, for convenience, delegates these tasks to a maid, cook or baby sitter. But, engaging in the difficult, complex and potentially deadly task of demolition and construction (adding a new master bedroom, a new master bath, a new garage in place of a carport, and a new roof) while exposing yourself and others to death or great bodily harm is not the equivalent of house cleaning, cooking or caring for children.

The rationale of this Court’s opinion in *Fernandez v. Lawson* (2003) 31 Cal.4th 31 does not control these facts. In *Fernandez*, a homeowner hired a worker to trim his trees. In holding that the homeowner was not required to comply with OSHA safety regulations, this Court focused on the issue of whether the tree trimmer was engaged in a “household domestic service” because OSHA would not apply to work deemed a “household domestic service.” (*Id.* at 36.)

This Court noted that OSHA does not defined “household domestic service”, there is no guidance in the legislative history of the statute, but that case law recognized a gardener as a “domestic servant” and wage regulations

recognized gardeners as part of “household occupations”. (*Id.* at 36.) It noted that it was common for homeowners to hire persons to trim trees at their residences. (*Id.* at 36.) This Court also surmised that the Legislature intended with the term “household domestic service” to refer to a broad category of workers. (*Id.* at 37.) Without reaching the issue of “whether a homeowner is subject to OSHA for noncommercial projects other than tree trimming”, this Court also determined that the term implied duties personal to the homeowner versus those relating to a business or commercial activity. (*Id.* at 37.) Finally, this Court found that “overwhelming public policy and practical considerations make it unlikely the Legislature intended the complex regulatory scheme that is OSHA to apply to a homeowner hiring a worker to perform tree trimming.” (*Id.* at 37.)

Here, the property owner Defendant was the owner/builder acting as an unlicensed contractor performing extensive demolition and construction activity through unlicensed workers. Construction workers are not deemed “domestic servants” under case law. They are not recognized by wage regulations as part of “household occupations”. It is not common for homeowners to act as unlicensed contractors performing extensive, year long remodeling, demolition and construction work.

The OSHA safety regulations based on Labor Code §§ 6300, 6303(b), 6400 and 6401 do not categorically exclude homeowners from their

application and do not contain any language that distinguishes between personal or commercial/business activity. Rather, OSHA was “enacted for the purpose of assuring safe and healthful working conditions for all” workers. (Labor Code § 6300 (underline added).)

Therefore, Plaintiff urges this Court to reject Defendants’ expected argument which would require this Court to rewrite the statutes to exempt homeowners or to predicate the obligation to comply with OSHA on proof that the activity was a commercial or business activity. “This court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed. This court is limited to interpreting the statute, and such interpretation must be based on the language used.” (*Seaboard Acceptance Corp. v. Shay* (1931) 214 Cal. 361, 365; Code Civ. Proc. § 1858 (“In the construction of a statute. . . the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted. . .”))

But, even if this Court evaluates the core issue by focusing on whether the activity was business versus personal in nature, Plaintiff submitted evidence demonstrating that Defendants’ remodeling and construction activity was more business in nature (or done to “flip” the home for a profit) as Defendants sold the subject home within months after the subject project was completed in September 2007 (as evidenced by the April 2008 grant deed.)

[AA 192 - AA197, AA 223.]

Finally, there are no public policy or practical considerations that would preclude literal application of the statute to require hirers who engage in “construction” and “demolition” work to comply with safety regulations for their employees. This Court has recognized that recent OSHA reforms had “the goal of deterring unsafe practices and reducing the number and severity of future accidents.” (*Elsner v. Uveges* (2004) 34 Cal. 4th 915, 930)

Holding that a property owner who elects to be an owner/builder and acts as an unlicensed contractor performing extensive remodeling, construction and demolition work through unlicensed workers has to comply with safety regulations for those workers would deter unsafe practices and reduce the number and severity of future accidents.

II. IF THIS COURT UPHOLDS THE COURT OF APPEAL’S HOLDING THAT HOMEOWNERS ARE NOW EXEMPT FROM OSHA WHEN THEIR REMODEL IS TO ENHANCE THE OWNERS’ ENJOYMENT OF THEIR RESIDENCE, CODE OF CIVIL PROCEDURE SECTION 437C(M)(2) AND DUE PROCESS REQUIRES THAT THIS CASE BE REMANDED TO ALLOW PLAINTIFF TO ENGAGE IN FURTHER DISCOVERY ON THE NEW ISSUE AS IT WAS NOT A GROUND RELIED UPON BY THE TRIAL COURT

C.C.P. § 437c(m)(2) imposes strict requirements for cases in which an appellate court considers affirming summary judgment based on a ground not “relied on” by the trial court. Prior to 2002, appellate courts could affirm

summary judgment if it was correct on any ground. (*Adams v. Pacific Bell Directory* (2003) 111 Cal.App.4th 93, 100.) This was "the rule until the Legislature amended the summary judgment statute in 2002." (*Ibid.*)

But, in 2002, subdivision (m)(2) was added to C.C.P. § 437c to address instances where the appellate court seeks to affirm a summary judgment ruling on grounds different from those relied on in the trial court. (*Id.* at pp. 100-101.)

C.C.P. § 437c(m)(2) provides that:

Before a reviewing court affirms an order granting summary judgment or summary adjudication on a ground not relied upon by the trial court, the reviewing court shall afford the parties an opportunity to present their views on the issue by submitting supplemental briefs. The supplemental briefing may include an argument that additional evidence relating to that ground exists, but that the party has not had an adequate opportunity to present the evidence or to conduct discovery on the issue. The court may reverse or remand based upon the supplemental briefing to allow the parties to present additional evidence or to conduct discovery on the issue. If the court fails to allow supplemental briefing, a rehearing shall be ordered upon timely petition of any party. (underline added.)

There can be no serious dispute that Plaintiff's due process rights require that the matter be remanded and Plaintiff be given an opportunity to engage in discovery on the new issue or distinction articulated by the Court of Appeal. "If the dispositive ground of law was not asserted in the trial court by the moving party and the record fails to establish that the opposing party could

not have shown a triable issue of material fact had the ground of law been asserted by the moving party, a reviewing court ordinarily cannot determine if the trial court's decision was correct" (*Juge v. County of Sacramento* (1993) 12 Cal.App.4th 59, 70 - 71.) "[D]ue process of law requires that the party opposing the motion must be provided an opportunity to respond to the ground of law identified by the court and must be given a chance to show there is a triable issue of fact material to said ground of law." (*Id.*)

In viewing the evidence in a light favorable to Plaintiff as the losing party (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 769), Defendants did not conclusively show that the subject extensive remodel was done only to enhance enjoyment of the home. Further, Plaintiff was not given an adequate opportunity to conduct discovery on the issue of whether or not Defendants' extensive remodel was personal in nature or whether it was done to sell or "flip" the home. This distinction was not raised by Defendants or the trial court. Rather, the exemption for remodeling for personal enjoyment is a distinction articulated for the first time by the Court of Appeal in its Opinion.

There is good reason to believe that, if he was afforded his statutory right to conduct discovery on this new issue, Plaintiff would have been able to show that the subject remodel was not personal in nature. Plaintiff filed a separate motion asking the Court of Appeal to take judicial notice of the April 2008 Grant Deed (Exhibit A) showing that Defendant Abich sold the subject home shortly after the subject project (which went through September 2007.)

[AA 192 - AA197, AA 223.]

The fact that Defendants sold the home shortly after the extensive remodel showed that the remodel was not “personal - to enhance the owners’ enjoyment of their residence.” The evidence was expected to show that the work in this case would not satisfy this Court’s newly created exemption and, accordingly, Defendants would be subject to OSHA regulations. As explained in Appellant’s motion for judicial notice, this document was not obtained earlier or included below (or presented to the trial court) because the Court of Appeal’s distinction between a remodel done for personal enjoyment (exempted) versus a remodel to sell or “flip” the home (not exempted) was not raised by Defendant or the Trial Court as a basis for determining whether the construction activity is exempted from OSHA regulations as a “household domestic service.”

If this Court does not expressly find that Defendants’ construction activity subjected them to OSHA, this Court should still hold that, under C.C.P. § 437c(m)(2), the case is remanded to allow Plaintiff to engage in further discovery and briefing because it affirmed the order granting summary judgment on a ground not relied upon by the Trial Court.

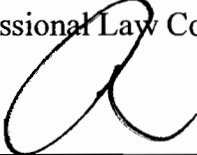
CONCLUSION

Homeowners who elected to be owner/builders and who act as unlicensed contractors and engage in extensive remodeling, construction and demolition projects through unlicensed workers must comply with OSHA safety regulations for those workers. The statutory language expressly deems “construction” and “demolition” activity to be the type of employment which requires compliance with OSHA. This activity cannot reasonably be construed to be a “household domestic service.” There is no statutory, regulatory or decisional authority or public policy that requires this Court to find that this type of extensive construction activity is a “household domestic service.” To hold that these defendant homeowners do not have to comply with OSHA would defeat the goal of OSHA to deter unsafe practices and reduce the number and severity of future accidents. Judgment for defendants should be reversed.

DATED: February 28, 2010

Respectfully submitted,
THE HOMAMPOUR LAW FIRM
A Professional Law Corporation

By:



Arash Homampour, Attorneys for
Petitioner/Appellant/Plaintiff,
OCTAVIANO CORTEZ

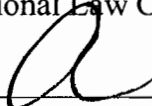
CERTIFICATE OF COMPLIANCE

I hereby certify under CA Rules of Court, Rule 8.204(c)(1) that this brief is produced using 13-point Roman type including footnotes and contains 4,595 words, which is less than the 14,000 words permitted by the rule. I am relying on the word count of the computer word processing program (Word Perfect) used to prepare this brief.

DATED: February 28, 2010

Respectfully submitted,
THE HOMAMPOUR LAW FIRM
A Professional Law Corporation

By: _____


Arash Homampour, Attorneys for
Petitioner/Appellant/Plaintiff,
OCTAVIANO CORTEZ

PROOF OF SERVICE

I am over the age of 18 and not a party to the within action. I am employed in the County of Los Angeles, State of California. My business address is 8383 Wilshire Boulevard, Suite 830, Beverly Hills, California 90211-2407.

On March 1, 2010, I served the following document(s) described as OPENING BRIEF on the interested parties in said action, by placing the original to the propounding party/ a true copy thereof to all other parties enclosed in sealed envelopes addressed as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Correspondence so collected and processed is deposited with the United States Postal Service that same day with postage thereon fully prepaid at Beverly Hills, California in the ordinary course of business.

STATE: I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 1, 2010, at Beverly Hills, California.

ISELA MORENO

SERVICE LIST

Clerk of Second District Court of Appeal
Division Four
300 So. Spring St. 2nd Floor
Los Angeles, CA 90013

*Court of Appeal
(1 copy)*

Robert Olson, Esq.
Greines, Martin, Stein & Richland, LLP
5900 Wilshire Boulevard, 12th Floor
Los Angeles, CA 90036
Fax (310) 276-5261

*Attorneys for Defendants/Respondents
Omar Abich and Lourdes Abich
(1 copy)*

John C. Notti, Esq.
Early, Maslach & Van Dueck
700 S. Flower Street, Ste. 2800
Los Angeles, CA 90017
Fax (213)615-2698

*Attorneys for Defendants/Respondents
Omar Abich and Lourdes Abich
(1 copy)*

Stuart Sherman, Esq.
Law Offices of Sherman and Miller
30961 W. Agouras Road, Ste. 215
Westlake Village, CA 91361
Fax (877)706-3795

*Co-Counsel for Plaintiff/Appellant
(1 copy)*

